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September 20, 1989

TO: **Bob** W. McNatt, Esq.
city Attorney
City of Lodi

FROM: Mark I. Weinberger, Esg. and Daniel P. Selmi, Esq.

SUBJECT: L.I.F.E. Committee v. City of Lodi
3 Civ. 26034

You have requested our **advice** on **whether the** City **of** Lodi should petition for rehearing in this **matter** and, if tnat petition were **denied,** petition the Supreme **Court** for **review.** Our **conclusions** are as follows:

(1) We believe that the City should petition for rehearing *in* **the** Court of Appeal.

(2) We **believe** *that* a petition for review **with** the Supreme **Court** is unlikely to **have much** chance **of success. We advise,** however, that no **final** decision **be made** at ***this*** **time regarding** any petition **for** review **until** further discussions are undertaken with counsel for ***the*** L.I.F.E. Committee **concerning the** City's **liability** for attorney's **fees.**

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As you know, **the** Court of Appeal **affirmed the** trial **court's** judgment invalidating Measure A. We believe that a request to the **Court for** rehearing **is** appropriate **for** two **reasons.** First, in this case the City **did** not take the position that Measure A on **its** face presented no **possibility** of a conflict with state annexation law. Rather, the City **argued** that it had construed the measure in **such** a way as **to** avoid any conflict. We cited well-established *case* law to **the** Court that if an initiative can **be** construed to uphold its constitutionality, the Court must **do** *so.*

The Court's opinion, however, never addressed whether the language of Measure A could support the City's construction. Instead, the Court simply read the language of paragraph five of the initiative, cited selected legislative history, and reached a conclusion on its meaning. It made no effort to determine whether the measure

could be **interpreted** to preserve its **constitutionality. We** believe that this **failure *is*** a serious flat: in **the** opinion **that should be** brought **to the** Court's attention. The Court's failure **to address** the City's construction ***is*** particularly troubling in light of **the fact** that, at the oral argument, the justices **emphatically** raised this principle **of** interpretation in questions to **the** parties.

Secondly, the Court's opinion seems to state that citizens have **no** power **to** require voter approval of general plan measures and zoning **ordinances.** This statement is overbroad and seemingly in direct conflict with **other** published court **of** appeal **opinions.** In **at** least **one** other case, the **court** upheld an initiative that **required** the voters of **a** city to approve **all** subsequent amendments to **the** land use **element of** the **city's general plan.**

In light of these two **points,** we believe that a petition for rehearing **is** warranted **and** should be filed. A draft of the **petition** is attached **to this** memorandum. In order. far it **to be** filed, it must be sent **to the** Court on **Thursday,** September 21.

With **respect** to **petitioning** the Supreme Court: for review, **we** do **not believe** that **a** petition for **review is** warranted. Obtaining a grant of review in civil cases at **this** time ***is*** **very difficult,** and **this** case **presents no** issues **of** *clear* statewide importance that night cause the Court to grant review. Because the case **concerns** annexation procedures, the opinion on **its** face **is** arguably consistent with **settled** case law on the point. Thus, obtaining review would be difficult.

We do not believe, however, that a final decision should be made at this time on whether to file a petition for review. Counsel for the L.I.F.E. Committee will undoubtedly seek attorney's fees for prevailing in both the trial and appellate courts. Until discussions are held on that issue, a decision regarding the filing a petition for review should be deferred for tactical reasons.

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COURT OF APPEAL FOR THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

L.I.F.E. COMMITTEE, A California Unincorporated Association, Petitioner/Respondent, v. CITY OF LODI, A California General Law city: and DOES I through X, Respondents/Appellants.	3 Civil 26034 PETITION FOR REHEARING

Appellant city of Lodi respectfully petitions the Court to grant rehearing in this matter. The Court heard oral argument on March 22, 1988 and issued its opinion on September 6, 1989. In that opinion the Court concluded that the initiative in question, Measure A, conflicted with state annexation law and therefore is invalid.

Appellant respectfully submits that the Court should grant its petition for two reasons. First, the Court's opinion conflicts with the fundamental principle for construing initiatives: if the measure can be interpreted to preserve its constitutionality, it must be so interpreted. In the present case, the City carefully interpreted and implemented Measure A to avoid any conflict with state law, but the Court's opinion never addresses whether the language of the initiative will bear that construction. Secondly, the Court's opinion could be read as holding that citizens cannot use their constitutional initiative powers to require voter approval of general plan amendments. That reading directly conflicts with other decisional law on the point.

ARGUMENT

I. THE COURT'S OPINION DOES NOT ADDRESS WHETHER MEASURE A CAN BE INTERPRETED TO PRESERVE ITS CONSTITUTIONALITY.

The principal language of Measure A that is at issue reads as follows: "Before land in the Green Belt area can be annexed by the City if [sic] Lodi, an amendment to the City's Land Use Element of the General Plan must be made and approved by a majority of the people voting in a [citywide] election." The Court determined that this provision was in conflict with state annexation law. It concluded that under the provision,

(1) "[A] favorable vote by the City's electorate allows the annexation to go forward; a negative vote stops proposed annexation in its tracks." Slip Opinion, 11;

(2) "If the electorate defeats an amendment to the land use element of the general plan, the initiative ordinance forbids annexation regardless of a LAFCO directive to annex that is binding on the City by reason of state statutes." Id. at 12; and

(3) "[T]he initiative ordinance conflicts with state annexation statutes by forbidding an annexation directed by the LAFCO if the voters reject an amendment of the land use element of the general plan." Id. at 14.

The City does not deny that the measure could be interpreted to conflict with state law. What it does contend is that its interpretation avoids the conflicts that the Court cites. See Appellant's Opening Brief, 34-36, 39-43; Appellant's Reply Brief, 8-16. Specifically, the City has interpreted the critical language "[b]efore land in the Green Belt can be annexed" as setting forth only the time at which a vote is taken, not as a

substantive provision empowering the City to block annexations. In other words, the City foresaw the possibility that the conflicts cited by the Court could occur and interpreted the measure to avoid them.

The Court's opinion never addresses whether such an interpretation of the language is possible. Yet settled case law on review of initiatives plainly requires the Court to interpret Measure A's language to preserve its constitutionality. As the Supreme Court emphasized earlier this year in Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 814 (1989), an initiative must be upheld unless its unconstitutionality "clearly, positively, and unmistakably appears." In a decision filed just last week, Lesher Communications, Inc. v. City of Walnut Creek, __ Cal. App. 3d __, 89 Daily Journal DAR 11678 (filed September 14, 1989), the Court of Appeal for the First District cited the same principle in construing a local land use initiative, observing: "Thus, if at all possible, we must interpret Measure H in such a manner as to confer validity." (Slip Opinion at 21).

In the present case, as in these decisions, if a construction is possible that will preserve the measure's constitutionality, the Court must adopt it. Yet the Court's opinion does not implement this principle. It never addresses whether Measure A -- which calls for a vote on a general plan amendment rather than an annexation -- can be construed to avoid constitutional problems. The opinion never addresses whether the language of the initiative will support the City's interpretation as well as the one adopted by the Court, and it never analyzes the

evidence in the record and the legislative history of the measure which supports the City's interpretation.

The City presented uncontradicted evidence that it had adopted a construction of Measure A to avoid the constitutional difficulties cited by the Court. By failing to examine the initiative in light of this evidence, the Court's opinion conflicts with settled law on the interpretation of initiatives.

II. THE COURT'S DISCUSSION OF THE CITIZENS' RIGHT TO REQUIRE VOTER APPROVAL OF GENERAL PLAN AMENDMENTS CONFLICTS WITH PRIOR CASE LAW ON THIS POINT.

In discussing whether Measure A conflicts with state law on annexations, the Court made the following statement:

> Moreover, the mechanism in the ordinance for elector control over annexation decisions is itself beyond the scope of the initiative power. State land use planning laws grant legislative power to the city to enact a general plan and zoning ordinances. (Gov. Code, §§ 65100-65910.) The city council may not condition this power by enacting an ordinance requiring voter approval of such measures. A fortiori neither may the electorate through the initiative fetter the exercise of the legislative power conferred by the statutes governing land use.

Slip Opinion, 15. The Court thus apparently called into question whether voters have the power under state general plan law to require voter approval of general plan amendments.

This statement conflicts with other case law which has held that the citizens do possess such power. In Lee v. City of Monterey Park, 173 Cal. App. 3d 798 (1985), the court upheld an initiative that required the voters of a city to approve all subsequent amendments to the land use element of the city's general plan. In that case plaintiffs alleged that this provision

improperly invoked the referendum power without complying with the procedures for referenda set forth in the Elections Code. The Court disagreed, finding "no difference between an initiative ordinance which precludes an amendment and one which permits amendments but requires voter approval to become effective." Id. at 812; see also Yost v. Thomas, 36 Cal. 3d 561, 570 (1984)

Unless the Court clarifies this statement, its opinion will inject inconsistency into state law on the powers of citizens to exercise planning rights through the initiative process. The City respectfully submits that the Court should rehear this matter or, at a minimum, modify its opinion to delete this language.

CONCLUSION

In Lesher v. City of Walnut Creek, __ Cal. App. 3d __, 89 Daily Journal DAR 11678, the First District Court of Appeal could have construed an initiative as either an amendment to the City's general plan, a construction that would avoid placing the measure's validity in doubt, or as a zoning ordinance, a construction that would give rise to doubts about its legality. The Court held that "to confer validity, the initiative must be construed as a general plan amendment because it can be so construed." Id. at 11685 (emphasis in original). Respondent City of Lodi respectfully

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requests that the Court should grant its petition for rehearing in the present case and apply this principle to Measure A.

Respectfully submitted,

DATED : _____

MARK I. WEINBERGER
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DANIEL P. SELMI

By _____
DANIEL P. SELMI

Attorneys for Respondent/Appellant